STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 22, 2011
v	No. 295927 Wayne Circuit Court
JOHNNY TODD, Defendant-Appellant.	LC No. 09-016135-FC

Before: SAAD, P.J., and K. F. KELLY and DONOFRIO, JJ.

PER CURIAM.

Defendant was convicted by a jury of armed robbery, MCL 750.529, assault with intent to commit murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to 30 years' imprisonment for his armed robbery conviction, life imprisonment for his assault with intent to commit murder conviction, five to ten years' imprisonment for his felon in possession of a firearm conviction, and five years' imprisonment for his felony-firearm conviction. He appeals as of right. We affirm.

I. BASIC FACTS

This case concerns a shooting. The victim, Michael Sanders, and his fiancée, Elizabeth Smith, went to visit their friend, Anthony Boyd (known as Bubba) on November 29, 2008. As Sanders returned to his car from Bubba's apartment, Sanders heard footsteps behind him. Sanders turned around and saw defendant. Sanders recognized defendant because he had previously met defendant at multiple barbeques at Bubba's house. Defendant was holding a gun and demanded money from Sanders. Sanders responded that he did not have any money. Sanders circled around the vehicle to the sidewalk and proceeded to walk backwards away from his vehicle. As Sanders turned to run away, he heard a gunshot and fell to the ground. Sanders was shot in the back on the right side. While Sanders was lying on the ground, defendant approached him and took the rings off of Sanders' fingers. Defendant left for a minute, but returned shortly and checked Sanders' pockets before running away. Sanders informed the police that defendant was the man who shot him and he picked defendant out of a lineup. Smith, who witnessed the shooting, was unable to identify defendant as the shooter.

In contrast, defendant claimed that that he was not at the scene when Sanders was shot, but instead was at the house of Vendetta Hudson, located at 4108 McClellan, with his girlfriend,

Katrina Hudson and his cousin, Reginald Martin. Defendant claimed that he heard about the shooting from his aunt, JoAnne Campbell Boyd, who was married to Bubba. JoAnne was at home with Bubba on November 29, 2008, and she heard the gunshots outside her apartment that night. JoAnne's son, Lavell Todd, went to see what happened and told JoAnne that Sanders had been shot. JoAnne called Vendetta only two or three minutes after the shooting to tell her what happened. JoAnne asked Vendetta if defendant was at her house and Vendetta responded affirmatively. While she was on the phone with JoAnne, Vendetta told Katrina, Reginald and defendant about the shooting. Upon hearing of the shooting, defendant responded that he was glad he was not there.

Despite defendant's alibi, the jury found him guilty of all the crimes charged. Defendant now appeals.

II. HEARSAY

Defendant's first issue on appeal is that the trial court erred in admitting hearsay evidence that that the rumor on the street was that defendant committed the crime. Generally, we review of evidentiary decisions for an abuse of discretion. *People v Starr*, 457 Mich 490, 491; 577 NW2d 673 (1998). An abuse of discretion occurs only when the court chooses an outcome outside the principled range of outcomes. *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008).

Relevant evidence is admissible unless excluded by constitution or a Rule of Evidence. MRE 402; *People v Small*, 467 Mich 259, 264; 650 NW2d 328 (2002). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401; *Small*, 467 Mich at 264. Hearsay is an out-of-court statement made by someone other than the declarant offered in evidence to prove the truth of the matter asserted. MRE 801(c); *People v Breeding*, 284 Mich App 471, 487; 772 NW2d 810 (2009). Hearsay is inadmissible unless it falls within an exception provided in the rules of evidence. MRE 802; *People v Stamper*, 480 Mich 1, 3; 742 NW2d 607 (2007).

The prosecution argued that the statement at issue on appeal was not hearsay because the prosecutor was intending to elicit testimony to impeach the testimony of Katrina. Any party may attack the credibility of a witness. MRE 607. Evidence of "a prior inconsistent statement of the witness may be admitted to impeach a witness even though the statement tends to directly inculpate the defendant." *People v Kilbourn*, 454 Mich 677, 683; 563 NW2d 669 (1997).

At trial, Katrina testified as an alibi witness on defendant's behalf. She testified that defendant was with her at the house of her cousin, Vendetta, during the shooting. Katrina testified that the only information she received about the shooting was that Sanders was shot. She stated that she obtained this information from Vendetta after Vendetta spoke on the telephone with JoAnne. The prosecution attempted to impeach Katrina on cross-examination by questioning her regarding a statement she later made to the police. In the statement, Katrina indicated that she received information that Sanders "was ambushed by several black men" and hit on the head before being shot. However, Vendetta testified that she did not tell Katrina that Sanders was ambushed by several men.

The prosecution also questioned Reginald, who was in the room with Katrina when Vendetta told them what she heard, about whether Vendetta told him that Sanders was ambushed by several black men. Defendant argues that the following testimony by Reginald resulted in improper hearsay:

> Q. Okay. Well, did [Vendetta] tell you the circumstances, such as that Michael Sanders was ambushed by people from an alley?
>
> A. No, she didn't because I feeled (sic) that she didn't really know what was going on because she wasn't there.
>
> Q. Did she tell you that he was ambushed by several black men?
>
> A. No, that came upon like a couple days later or something.
>
> Q. So that information came to you a couple days later?
>
> A. Yeah, like hearsay in the street.
>
> Q. Hearsay in the street?
>
> A. Yes. That information, that he was – I heard a lot of stories in the street like when I went out, I heard it was a lot of stuff.
>
> Q. Okay. And you're hearing in the street that he was ambushed by several black men?
>
> A. Several? No. No. What I initially heard that *he said it was Johnny Todd*.
>
> Q. You heard that right off the bat?
>
> A. No. It's like when I went out in the street, like the next day, they were saying it was him. *Then they were saying it was Johnny.* Then they say they don't know who it was. Then they said it was a couple people. I don't know so – [(Emphasis added).]

In particular, defendant is challenging the admission of the statements that individuals on the street said it was defendant who committed the shooting.

In this case, we conclude that Reginald's testimony that individuals in the street said that defendant committed the murder was inadmissible hearsay. The prosecution argues that the statement was not offered for the truth, but to impeach Katrina. However, the statement that Reginald heard on the street that defendant committed the shooting and robbery does not impeach Katrina's testimony that she only heard from Vendetta that Sanders was shot and nothing else. The two statements are completely unrelated. Reginald's testimony has nothing to do with what Katrina knew when or with what Vendetta told him and Katrina. Given that Reginald's testimony at issue here did not impeach Katrina, we can only conclude that the

statement was being offered for its truth. Since the statement does not fall into any of the recognized exceptions, the trial court erred in admitting it.

Even though the trial court erred in admitting the evidence or failing to strike it, the error was harmless. No judgment or verdict may be reversed in any criminal case on the ground of improper admission of evidence unless, in the opinion of the court after an examination of the entire cause, it affirmatively appears that the error resulted in a miscarriage of justice. *People v Gursky*, 486 Mich 596, 619; 786 NW2d 579 (2010). In this case, the hearsay statement that defendant committed the shooting was admitted into evidence after Sanders testified that he believed defendant committed the shooting and that he had identified defendant in a lineup as the shooter. As a result, the information that defendant was identified as the shooter was already in the record and the hearsay statement was harmless.

III. PROSECUTORIAL MISCONDUCT

Defendant next argues that the prosecutor engaged in misconduct when he vouched for the credibility of a witness and disparaged defense counsel during his closing rebuttal argument. We disagree. As this issue was not preserved at the trial court, we review the issue for plain error. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). A defendant must establish that the error was plain, and that the error affected the outcome of the proceedings. *Carines*, 460 Mich at 763.

Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). A prosecutor's personal attack upon the defense counsel can infringe upon the presumption of innocence and thus be improper. *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996). Moreover, a prosecutor may not vouch for the credibility of a witness to the effect that he has some special knowledge that the witness is testifying truthfully. *People v Seals*, 285 Mich App 1, 22; 776 NW2d 314 (2009). Also, a prosecutor may not make a statement of fact to the jury that is unsupported by the evidence. *People v Unger*, 278 Mich App 210, 241; 749 NW2d 272 (2008). However, a prosecutor may argue from the facts in evidence that the defendant or another witness is worthy or not worthy of belief. *People v Dobek*, 274 Mich App 58, 67; 732 NW2d 546 (2007). He or she is free to argue the evidence and all reasonable inferences arising from it as they relate to his or her theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

In this case, defendant argues that the prosecutor improperly attacked defense counsel when he made the following comments:

> Counsel had a lot of faith or believed that the testimony of the Defendant's family and witnesses and alibis came off as well as he insinuates in his clothing [sic], I don't think you'd go into the fact whether this was an AWIM or this case is an armed robbery, why would it be relevant really. My guy wasn't there, my guy didn't do it, we don't know what the guy did when he shot him, what his intent was and we don't care if he robbed the guy, because my guy wasn't there. But he goes into that. He goes into it in his opening and he goes into it in his closing.

> And the People have to prove that, those elements, which is the testimony of Mr. Sanders certainly did, but not only that, but the physical evidence.

We conclude that this statement made by the prosecutor was not improper. The prosecutor was merely responding to defense counsel's inconsistent closing argument in which defense counsel argued both that defendant should not be convicted of assault with intent to murder because he did not continue to shoot at Sanders after he was on the ground and defendant should be acquitted of all charges because he was misidentified and was not there. As a result, the prosecutor's argument did not amount to a personal attack on defense counsel but instead amounted to a reasonable response to defense counsel's closing argument.

Defendant also highlights the following argument as improper:

> When you look at -- Counsel backs off the testimony of Lavell about the lighting because he knows that's wrong, but indicates either Lavell wasn't trying to lie to you, certainly. Why would you go and say that those lights aren't on when everybody else, the police, everybody else arriving on that scene, only to cover for your cousin, only to say that nobody could identify anybody out there.

Again, we conclude that this argument was not improper. The prosecutor was arguing facts in evidence and the reasonable inferences from them. Many individuals, including Sanders, Smith, Maxie, Muczynski, and Stinson, testified that the area where Sanders was shot was well lit. Lavell was the only person who testified that it was dark and hard to see. As a result, the prosecutor was not improperly disparaging defense counsel or using the prestige of his office to question Lavell's credibility; he was arguing that Lavell was not worthy of belief based upon the evidence in the record.

Furthermore, defendant argues that the prosecutor improperly vouched for the credibility Smith when he stated:

> If the victim wanted to overstate his case or the family members wanted to overstate the case, why not get Ms. Smith to say, hey, that's the guy right there. All right. But Ms. Smith is honest. She tells you I can't identify him. I didn't get a chance to see his face. At one point Mr. Sanders was standing in front of me, the rest of time he had a hood on and he was facing away from me as he was taking property off of Mr. Sanders.

We conclude that this argument was also not improper. The prosecutor was not improperly vouching for the credibility of Smith. Instead, he was arguing facts in evidence – that Smith was unable to identify defendant as the shooter because she could not see his face – and the reasonable inferences from those facts.

In any event, any error caused by the prosecutor's conduct was remedied by the trial court's instructions. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors. *People v Chapo*, 283 Mich App 360, 370; 770 NW2d 68 (2009) (internal quotations omitted). In this case, the trial court instructed the jury that it had the responsibility to decide the facts of the case based on the evidence admitted. It further instructed the jury: "The lawyers' statements and arguments are also not evidence. They're only meant to

help you understand the evidence and each side's legal theories." Therefore, any error caused by the prosecutor's statements was remedied by the trial court's instructions to the jury not to rely on statements made by lawyers.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant further argues that defense counsel was ineffective for failing to move to strike the above discussed hearsay evidence from the record and for failing to object to the prosecutor's statements during his rebuttal argument. We disagree. The determination of whether a defendant has been deprived of the effective assistance of counsel is a mixed question of fact and law. *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859, amended 481 Mich 1201 (2008). We review the trial court's factual findings for clear error and review its constitutional determinations de novo. *Id.* As defendant did not establish a testimonial record regarding the ineffective assistance of counsel claim, our review is limited to mistakes apparent on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). Generally, to establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

Counsel's performance must be measured without the benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). This Court will not substitute its judgment for the judgment of counsel regarding matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). A lawyer is not ineffective for failing to assert a futile objection. *Unger*, 278 Mich App at 256.

In this case, we conclude that defense counsel was not ineffective for failing to move to strike Reginald's hearsay testimony that he heard that defendant committed the shooting. Defense counsel objected to Reginald's testimony on the basis of hearsay. Defense counsel responded appropriately to the prosecution's argument that the testimony was being offered for impeachment of Katrina, arguing that Reginald's testimony was unrelated to Katrina's testimony. The trial court refused to decide the issue by stating:

> Well, you're both seasoned lawyers. You know what the rules of evidence allow and don't allow. I would ask you be [sic] mindful of the rules, frame your question accordingly. You may proceed unless there's any other requests for relief from the Court at this point, gentleman.

Defense counsel did not ask the trial court to strike the testimony at this time. We conclude that defense counsel's failure to strike was not ineffective given that he objected to the testimony and articulated why the testimony was hearsay.

Even if defense counsel's performance was deficient for failing to move to strike the testimony, defendant has not demonstrated that he suffered prejudice. Sanders, the victim,

testified at trial that defendant committed the shooting and that he picked defendant out of a lineup. As a result, even if Reginald's testimony that the word on the street was that defendant committed the shooting had been struck, the outcome of the case would have likely been the same. The jury heard Sanders testimony and the alibi witnesses, and chose to believe Sanders.

Defense counsel was also not ineffective for failing to object to the prosecutor's rebuttal arguments. As is discussed at length above, the prosecutor's arguments during the rebuttal were not improper. Any objection to them would have been futile. Moreover, defendant has failed to show that even if defense counsel had objected that the outcome of the case would have been different.

V. SENTENCING

Finally, defendant argues that the trial court erred in scoring defendant ten points for offense variable (OV) 4 and fifteen points for OV 10. A trial court's decision regarding the points to assess in the sentencing guidelines calculations is reviewed for "whether the court properly exercised its discretion and whether the record adequately supports a particular score." *People v Wilson*, 265 Mich App 386, 397; 695 NW2d 351 (2005) (internal quotations omitted).

With regard to OV 4, psychological injury, ten points must be assessed if a "serious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). "[T]he fact that treatment has not sought is not conclusive" when scoring the variable. MCL 777.34(2); *People v Wilkens*, 267 Mich App 728, 740; 705 NW2d 728 (2005). Testimony that a victim was afraid during the offense is enough to score the ten points under OV 4. *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004).

In this case, we conclude that the trial court did not err in assessing defendant ten points for OV 4. Although there is no evidence in the record that Sanders sought treatment for psychological injury as a result of defendant's actions, Sanders testified that he was "surprised" and "shocked" when defendant approached him with a gun. Moreover, since defendant shot Sanders, Sanders has been unable to walk. Losing the ability to walk likely resulted in a psychological injury sufficient to score defendant ten points for OV 4.

Under OV 10, exploitation of a victim's vulnerability, 15 points may be assessed if "[p]redatory conduct was involved." MCL 777.40(1)(a). Predatory conduct requires conduct, which occurred before the commission of the offense that was directed at the victim and was directed at the victim for the primary purpose of victimization. MCL 777.40(3)(a); *People v Cannon*, 481 Mich 152, 160; 749 NW2d 257 (2008). In *Cannon*, the Michigan Supreme Court uses a simile to illustrate the meaning of predatory conduct directed at a victim: "a lion that sees antelope, determines which is the weakest, and stalks it until the opportunity arises to attack it engages in conduct directed at a victim." *Id.* at 160. Moreover, the preoffense conduct must be performed for the purpose of victimization, "directed at a person for the primary purpose of causing that person to suffer from an injurious action or to be deceived." *Id.* at 161.

In this case, the trial court erred when assessing defendant 15 points for OV 10. There is no evidence in the record that defendant engaged in any preoffense conduct for the purpose of

injuring or deceiving Sanders. Moreover, the prosecution concedes on appeal that the trial court improperly scored OV 10.

The trial court's error, however, does not require resentencing. An error in scoring the sentencing guidelines which does not affect the total offense variable score enough to change the applicable sentencing guidelines range is harmless error. *People v Johnson*, 474 Mich 96, 103; 712 NW2d 703 (2006). In this case, defendant's offense variable score should be altered from 130 to 115. Based on the sentencing offense of armed robbery, a class A offense, the offense variable score of 115, the prior record variable score of 110, and defendant's status as a fourth habitual offender, defendant's guidelines range remains 270 to 900 months. MCL 777.62. Therefore, defendant need not be resentenced.

Affirmed.

/s/ Henry William Saad
/s/ Kirsten Frank Kelly
/s/ Pat M. Donofrio